IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 182

KENNETH C. GORDON AND KENNETH J. MACLEOD,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR THE PETITIONERS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

GEORGE F. CALLAGHAN,
105 West Adams Street,
Chicago, Illinois,

MAURICE J. WALSH,
29 South La Salle Street,
Chicago, Illinois,
Attorneys for Petitioners.

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OPINIONS BELOW.

The trial court filed no opinion. The opinion of the Court of Appeals (R. 493-501) is reported in 196 F. 2d 886.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 14, 1952 (R. 502). Petition for Rehearing was denied June 7, 1952 (R. 503). Petition for a writ of certiorari was granted October 13, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

The Writ of Certiorari was granted herein limited to questions 2 and 3 presented by the Petition for the Writ.

STATEMENT OF THE CASE.

Petitioners, Kenneth Gordon and Kenneth MacLeod, together with Albert Swartz, were indicted on four counts. Two counts averred their unlawful possession of goods stolen while in interstate commerce, in violation of 18 U. S. C. 659, and two other counts charged that they caused the stolen property to be transported further in interstate commerce in violation of 18 U. S. C. 2314. Swartz died before trial and was dismissed from the indictment. The jury found both petitioners guilty, whereupon judgment entered, imposing upon each a sentence of ten years. The Court of Appeals affirmed.

The salient essential facts are as follows: On July 10, 1950, a large quantity of camera film was stolen from an interstate shipment which had, as its origin, Rochester, New York and, as its destination, Chicago, Illinois. It was charged that petitioners did on July 20, 1950, possess (Count I, R. 3) and on the same date transport in interstate commerce (Count II, R. 4) a certain portion of the stolen property. Counts III (R. 4) and IV (R. 5) charge respectively that the petitioners possessed and transported in interstate commerce an additional portion of the stolen merchandise on July 27, 1950.

James I. Marshall, was the Government's chief and key witness. It was upon his evidence as to the meetings, conversations and happenings between the witness, Swartz, and the petitioners on July 20 and July 27, 1950, that the conviction rests. His evidence implicating the petitioners with the occurrence on July 20, 1950, was uncorroborated. Agents of the FBI did corroborate Marshall's testimony in a limited fashion as to certain physical activities on July

27, 1950. These agents, however, did not testify to any events or conversations leading up to the acquisition of the stolen film as described by Marshall.

Marshall testified that on July 20, 1950, he and Swartz came to Chicago from Detroit by automobile (R. 152); that he was introduced to Gordon by Swartz in Gordon's jewelry store and that Swartz and Gordon conversed in the back room of the store; that thereafter he, Swartz and Gordon drove to a garage, the location of which he did not know. A truck was backed out of the garage and the witness drove his car into the garage. Marshall said that a man who "resembled" MacLeod was present (R. 155). Under Swartz's guidance, cases of film which were stacked in the garage were put into the car and Swartz and the witness then drove the car to Detroit (R. 156). Some of the stolen film was dropped off at Swartz's home in Detroit and the rest was taken to Marshall's store (R. 157).

Marshall said that on July 22, 1950, he and Swartz again came to Chicago and met Gordon (R. 162). Swartz and Gordon had a conversation and then Gordon and the witness loaded about 10 or 11 cases of the film into the witness' car from a truck which was standing near by and the stolen film was then taken back to Detroit (R. 163-164). This event is not charged in the indictment, and the evidence was limited to "intent" of Gordon (R. 434).

On July 27, Marshall and Swartz again came to Chicago by automobile and Swartz again talked to Gordon in the jewelry store. Gordon gave Swartz a slip of paper containing the address 215 East Erie Street and the name "Ken" was on the slip (R. 166-167). The witness and Swartz went to the given address where they met MacLeod; that MacLeod, Swartz and the witness went to a garage adjacent to 215 East Erie Street where some cases of the stolen film were unloaded from a truck in the garage.

The witness' car was backed into the garage and the film was placed therein. The truck involved was the same truck the witness had seen on the two previous occasions (R. 168-170). Swartz and the witness drove the witness' car back to Detroit. Part of the film was dropped off at Swartz's home and the balance was taken to the store of the witness (R. 172-173). Marshall was arrested in Detroit on July 28, 1950, and a large part of the stolen film was found in his possession (R. 176). He had sold some of it and given the money to Swartz (R. 178).

Cross-examination developed that on arrest he was questioned for an hour by FBI agents and made a written statement or confession. (The District Attorney was asked if he had the statement and said he didn't have it in Court.) A demand for its production was denied (R. 194). Further questioning showed that the statement in no way implicated either defendant and a demand for its production was again denied (R. 205). In this first statement he said he got the film from Swartz (R. 205) but didn't remember if he said he purchased it from Swartz (R. 206). After his arrest on July 28th it was an every day occurrence for him to make statements to the FBI (R. 206). He made quite a few statements, either four, five or six and signed each one and each statement varied slightly. Each time he added something he remembered (R. 206). Between July 28th and August 25th he made five statements to the FBI but did not implicate the defendants until August 25, 1950 (R. 207), a week after his own plea of guilty in Detroit on August 18th, 1950 (R. 197). A demand for the production and inspection of all of these statements was again made and denied (R. 207).

Marshall came to Chicago on the first occasion at Swartz's suggestion (R. 172) and gave Swartz the money he collected on the film he sold in Swartz's office (R. 178).

Swartz paid his expenses from Detroit to Chicago on the first trip (R. 180). He didn't remember if he gave Swartz any more than $1050.00 (R. 186). At the garage on July 20th it was Swartz who selected the film to be put in the car (R. 191). The only person to whom he gave any money was Swartz (R. 207). He gave Swartz some money but didn't remember whether it was several hundred dollars or forty dollars or ten dollars nor when he gave it to him. He had $600 or $700 in his pocket on the first trip to Chicago and may have given Swartz around $300 (R. 208). He was to turn the money over to Swartz as he sold the film (R. 208). He and Swartz were splitting the profits. Prior to July 20th he had done business with Swartz and had gotten things off of Swartz (R. 209). He never saw Swartz give Gordon or MacLeod any money (R. 218). On each occasion part of the film was dropped off at Swartz's home in Detroit.

Marshall insisted throughout his cross-examination that he was not testifying by reason of any threats, hope or promise of immunity. (See footnote to opinion Court of Appeals (R. 498)). He said that no person had suggested to him that if he cooperated with the authorities, and testified against others, that he would get consideration (R. 204).

Cross-examination as to whether at the time of his plea of guilty in Detroit he was advised in open Court that his counsel and the prosecutor had been in chambers and discussed disposition of his case with the Judge was met by objection (R. 198). The jury was excluded and defendants offered to prove from a transcript that at the time he entered his plea of guilty, he insisted to the Court, over that plea, that he still was not guilty; that he told the Court no one had promised him anything and that in open Court the District Judge said to him:

"Very well, the plea of guilty is accepted. Now I

am going to refer your case to the Probation Department for presentence report. I think I should say to you, as I said to your lawyer yesterday when he and Mr. Smith called upon me in chambers yesterday morning, that it seemed to me that if you intended to plead guilty and expected a recommendation for a lenient sentence or for probation from the Probation Department that it would be essential that you satisfy the Probation Department that you have given the law enforcement authorities all the information concerning the merchandise involved in this proceeding and it is very important for the law enforcement authorities to apprehend all of those who participated in this rather large theft from the interstate commerce shipment. I am not holding out any promises to you, but I think you would be well advised to tell the probation authorities the whole story even though it might involve others" (R. 198-199).

The Court sustained the Government's objection and forbade the proffered cross-examination (R. 200). Counsel for the petitioners were then forbidden to ask the witness whether he had been told by the District Judge that if he expected any leniency he better cooperate with the law enforcement authorities (R. 200).

A great volume of proof was introduced by the Government through the testimony of agents of the FBI concerning the recovery of the stolen merchandise from various places in Detroit, Michigan. Several employees of the trucking concern testified to the shipment of film from Rochester in New York to Chicago. An official of the Eastman Kodak Company gave evidence attempting to establish the value of the stolen merchandise. We do not set forth this evidence in this Statement of the Case because none of it is material to the questions presented on which the Writ of Certiorari was allowed.

The petitioners both testified in their own defense and denied all complicity in the offenses. They denied any

and all participation in the events described by Marshall as having occurred on July 20th and July 22nd. As to the events of July 27th, 1950, the petitioners both gave evidence that their connection with the stolen film on that date resulted from a favor extended to Swartz by Gordon in the use of the garage at 215 East Erie Street. This evidence tended to prove that the film belonged to Swartz and that it was stored in the aforementioned premises as an accommodation to Swartz and turned over to him when he and Marshall called for it on July 27th, 1950. Both petitioners denied all knowledge of the stolen character of the film (Gordon R. 338-356), (MacLeod R. 358-390).

SPECIFICATION OF ERRORS.

The Court of Appeals erred in holding that the trial court did not unduly restrict the cross-examination of the key witness for the prosecution in two instances:

1. In denying motions for the production, inspection and use on cross-examination of several written statements concerning the details of the crime made by the witness to agents of the FBI immediately after his arrest when it appeared that such statements, contrary to his testimony, did not implicate the defendants.

2. In forbidding cross-examination going directly to the motive and bias of the witness and denying a proffer of evidence to show that the witness was testifying with a hope and expectation of probation in his own case, pursuant to an admonition of the District Judge before whom he was awaiting sentence.

SUMMARY OF ARGUMENT.

I.

Where Government's principal witness, who gave damaging testimony against the defendants admitted on cross-examination that he had, on his arrest, and on several occasions thereafter, made written statements which left the defendants on trial scatheless, it was error to refuse production, inspection of, and cross-examination upon those written statements.

Alford v. *United States*, 282 U. S. 687, 692, 75 L. Ed. 624.

United States v. *Krulewitch*, 145 F. 2d 76, 79 (C. A. 2).

Heard v. *United States*, 255 F. 829 (C. A. 8).

United States v. *Andolschek*, 142 F. 2d 503 (C. A. 2).

Asgill v. *United States*, 60 F. 2d 776 (C. A. 4).

On Lee v. *United States*, 96 L. Ed. Adv. Op. 776.

United States v. *Zwillman*, 108 F. 2d 802 (C. A. 2).

United States v. *Beekman*, 155 F. 2d 580 (C. A. 2).

United States v. *Grayson*, 166 F. 2d 863 (C. A. 2).

Edwards v. *United States*, 312 U. S. 473.

II.

It was prejudicial and reversible error to deny cross-examination of the Government's key witness as to statements or remarks to him by a Judge before whom he was awaiting sentence on his plea of guilty, and which remarks implied that probation would be forthcoming to the witness, if he satisfied the prosecuting authorities by his evidence; and it was error to deny leave to bring the Judge's statement to the witness to the attention of the jury.

Alford v. *United States,* 282 U. S. 687, 692.

Meeks v. *United States,* 163 F. 2d 598, 599 (C. A. 9).

Farkas v. *United States,* 2 F. 2d 644, 647 (C. A. 6).

Sandroff v. *United States,* 158 F. 2d 623, 629 (C. A. 6).

People v. *Lacey,* 339 Ill. 480, 485.

Hoyt v. *People,* 140 Ill. 588, 595.

Moore on Facts, Vol. II, Page 1154.

ARGUMENT.

It Is the Essence of a Fair Trial That Reasonable Latitude Be Given the Cross-Examiner. The Court Committed Prejudicial and Reversible Error in Unduly Restricting the Cross-Examination of Government Witness James I. Marshall.

The instances in which the cross-examination of the witness Marshall were unduly restricted constitute the basis for questions Nos. 2 and 3 presented by the Petition for the Writ of Certiorari upon which the Petition was granted. We shall discuss the questions in the order in which they are presented.

> Question No. 2. Where the key witness for the prosecution has given damaging evidence against the defendants and it is developed on cross-examination that the witness at the time of his arrest and on several occasions thereafter made written statements to the FBI in which he failed to implicate the defendants and in fact named another person as the one from whom he obtained the stolen merchandise, is it error to deny inspection and production of and cross-examination on the previous statements so that a full and complete disclosure may be had?

Marshall was the Government's chief and key witness. Without his evidence as to the meetings, conversations and happenings between the witness, Swartz, and the defendants Gordon and MacLeod, the defendants could not have been implicated in the offense. Without his evidence of the possession of the alleged stolen film on the various dates involved, "possession" could not have been established in the defendants. Without his evidence as to the taking of the film to Detroit and its subsequent disposition, the

"transportation" could not have been proven. A rather complete summary of his evidence appears, *supra*, pages 3-6.

The case, except for the "interstate" and "value" features depended so entirely and completely on the testimony of Marshall that if his evidence was not believed, the record would not support the verdict. His veracity, interest, motive and bias were, therefore, extremely important. Marshall insisted throughout that he did not know the film which he transported to Detroit was stolen (R. 204-219) and, despite his plea of guilty at Detroit, told the court there that he did not know the property was stolen (R. 204). He testified, however, to participation in and all the details of the crime involved here and his testimony, therefore, must be treated as that of an accomplice.*

We believe we can safely say that the evidence of guilt of the petitioners, depending as it did so completely on Marshall's evidence, hung in such delicate balance that the slightest fact or circumstance, impugning the credibility of Marshall, would undoubtedly have brought a different result.

Cross-examination of Marshall developed that on arrest he was questioned for an hour by FBI agents and made a written statement or confession. (The District Attorney was asked if he had the statement and said he didn't have it in Court.) A demand for its production was denied

*While the testimony of accomplices will sustain a verdict, the fact that the judge should instruct the jury to accept it with caution—*Holmgren* v. *United States*, 217 U. S. 509, 524, 30 S. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; *Caminetti* v. *United States*, 242 U. S. 470, 495, 37 S. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168—serves to show that a case resting on such testimony is "weak." *Berger* v. *United States*, 295 U. S. at page 89, 55 S. Ct. 629, 79 L. Ed. 1314; *Arnold* v. *United States*, 10 Cir., 94 F. 2d 499, 501, 508; cf. *Nanfito* v. *United States*, 8 Cir., 20 F. 2d 376, 379; *Jones* v. *United States*, 53 App. D. C. 138, 289 F. 536, 539.

(R. 194). Further questioning showed that the statement in no way implicated either petitioner and a demand for its production was again denied (R. 205). In this first statement he said he got the film from Swartz (R. 205) but didn't remember if he said he purchased it from Swartz (R. 206). After his arrest on July 28th it was an every day occurrence for him to make statements to the FBI (R. 206). He made quite a few statements, either four, five or six and signed each one and each statement varied slightly. Each time he added something he remembered (R. 206). Befween July 28th and August 25th he made five statements to the FBI but did not implicate the petitioners until August 25, 1950 (R. 207), a week after his own plea of guilty in Detroit on August 18th, 1950 (R. 207). A demand for the production and inspection of all of these statements was again made and denied (R. 207).

It is important to bear in mind the following testimony of the witness:

Marshall came to Chicago on the first occasion at Swartz's suggestion (R. 172) and gave Swartz the money he collected on the film he sold in Swartz's office (R. 178). Swartz paid his expenses from Detroit to Chicago on the first trip (R. 180). He didn't remember if he gave Swartz any more than $1050.00 (R. 186). At the garage on July 20th it was Swartz who selected the film to be put in the car (R. 191). The only person to whom he gave any money was Swartz (R. 207). He gave Swartz some money but didn't remember whether is was several hundred dollars or forty dollars or ten dollars nor when he gave it to him. He had $600 or $700 in his pocket on the first trip to Chicago and may have given Swartz around $300 (R. 208). He was to turn the money over to Swartz as he sold the film (R. 208). He and Swartz were splitting the profits. He had known Swartz for three years before coming to

Chicago and prior to July 20th he had done business with Swartz and had gotten things off of Swartz (R. 209). (A Government objection was sustained to questions having to do with his previous transactions with Swartz) (R. 209). He never saw Swartz give Gordon or MacLeod any money (R. 218). On each occasion part of the film was dropped off at Swartz's home in Detroit. An attempt to show that Marshall had in a previous proceeding testified that he bought the stolen film from Swartz was frustrated by a Government objection (R. 182-186).

We respectfully submit that contrary to the finding of the Court of Appeals the record clearly shows that Marshall's written statements were contradictory of his evidence on both direct and cross-examination and that had inspection of and cross-examination on these statements been permitted the testimony of the witness would have been successfully impeached. Preliminary cross-examination had shown that, contrary to his testimony from the witness stand, he had in his statement made upon arrest and in several statements thereafter failed to name or implicate either of the petitioners and had in fact stated that he got the film from his associate Swartz. This preliminary cross-examination showed that the several statements varied from each other, were added to each time, and that it was not until the last statement made on August 25, 1950, that he named either of the petitioners. This last statement was made a week after he had been brought to bar and was facing sentence upon an indictment charging him with possession of the stolen merchandise involved in this proceeding.

We call the attention of the Court to the transcript of the proceedings had in Detroit on August 18, 1950, when Marshall entered his plea of guilty (R. 198-199). There, after the Court had admonished Marshall to tell the probation

authorities the whole story even though it might involve others, Marshall stated to the Court, "Yes, sir. I told Mr. Sherry everything I knew, and I tried to be cooperative" (R. 199). Although Marshall had at this time made several written statements to the FBI he had not yet implicated the petitioners. We must assume he was truthful with Judge Levin. He did not name the petitioners until August 25th, one week after this Court appearance (R. 207). Having told the FBI "everything" he knew prior to naming the petitioners can there be doubt as to the statements being contradictory of his testimony in other particulars?

Not having implicated either of the petitioners in any of his statements until the last one of August 25th, 1950, we may well make the following inquiries: Who did he mention in all of the statements made prior to August 25th? How did the s tements vary from each other and from his testimony? What further contradictions were there between his testimony and the statements than those shown by the preliminary cross-examination, viz., that he had not named the petitioners in his statements and had, in fact, named another as the one from whom he received the merchandise? What was added to each statement subsequent to the first one? Were the additions due to a faulty memory or was there a motive to conceal or fabricate? Why did he not mention the petitioners until the last statement made a week after his plea of guilty? Having said in his first statement that he got the film from Swartz (R. 206) what did he say with reference to Swartz in the subsequent statements? Did he name someone other than Swartz and the petitioners and, if so, who? Finally, were his statements consistent with the testimony given by the petitioners in their own defense?

In *United States* v. *Krulewitch*, 145 F. 2d 76 (C. A. 2),

inspection of a prior statement of a witness was refused as in this case. Judge L. Hand, speaking for the Court, said at page 79:

"We hold therefore that the statement was competent to contradict the testimony of Joyce; and, except for what we shall say in a moment, if the accused had offered it in evidence, the error of excluding so much of it as contradicted her testimony—a matter to be determined by the judge—would have been apparent. That the accused did not do; on the contrary, he continued to demand an inspection of it, which was a different matter. It would have been proper to refuse that demand except for the fact that the statement was not competent until Joyce had been questioned as to whether she had not said what it purported to declare, and had been given an opportunity to admit that she had. *Conrad* v. *Griffey*, 16 How. 38, 46, 47, 14 L. Ed. 835; *The Charles Morgan*, 115 U. S. 69, 77, 78, 5 S. Ct. 1172, 29 L. Ed. 316; *Chicago, M. & St. P. R. Co.* v. *Artery*, 137 U. S. 507, 519, 11 S. Ct. 139, 34 L. Ed. 747; *Bennett* v. *Hoffman*, 2 Cir., 289 F. 797. But since the accused could not ask her these necessary questions in preparation for admission of the statement, it was proper for him to demand an inspection, and the refusal was erroneous."

* * * * * *

"That there are contrary decisions is true, but justice so plainly points in one way that we cannot hesitate to choose as we have indicated."

* * * * * * *

"Finally, we cannot disregard the error. One jury had already disagreed. The statement professed to be a complete account of Joyce's dealings with the accused, and it left him scatheless. Joyce herself was shown to be to the last degree untrustworthy; and we surely cannot say that this circumstantial story so totally at variance with her testimony, might not have created enough doubt to turn the scales in favor of the accused."

Heard v. *United States*, 255 F. 829 (C. A. 8), is particularly applicable here because there, as here, cross-examination was unduly restricted as to prior statements of the witness. The Court said at page 832:

> "The cross-examiner has the right to prove by his adversary's witness, if he can, what inconsistent statements he has made, not only in general, but in every material detail, for, the more specific and substantial the contradictory statements were, the less credible is the testimony of the witness."
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> * * * * *
>
> "A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error."
>
> * * * * *
>
> "The refusal of the court below to permit counsel for the defendant Heard to draw forth from the witness Ahring by cross-examination the entire statement he first made relative to the robbery or theft too much restricted that examination and was erroneous."

In *Alford* v. *United States*, 282 U. S. 687, 692, 75 L. Ed. 624, this Court said:

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. (Citing cases.) It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. (Citing cases.) To say that prejudice can be established only by showing that

> the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. (Citing cases.)"

Petitioners were tried and convicted by the Government and sentenced to terms of imprisonment for ten years while at the same time evidence was kept out of the trial that might have shown Marshall was unworthy of belief and which might have shown the complete innocence of petitioners. This practice has been uniformly condemned by the Court of Appeals for the Second Circuit. *United States* v. *Zwillman*, 108 F. 2d 802 (C. A. 2d, 1940), *United States* v. *Andolschek*, 142 F. 2d 503 (C. A. 2d, 1944), *United States* v. *Beekman*, 155 F. 2d 580 (C. A. 2d, 1946), *United States* v. *Grayson*, 166 F. 2d 863 (C. A. 2d, 1948), cf. *Edwards* v. *United States*, 312 U. S. 473, 61 S. Ct. 669, 674 (1941).

In *United States* v. *Andolschek*, 142 F. 2d 503 (C. A. 2), the Court in considering the exclusion of certain reports of the defendant alcohol tax unit inspectors, said, page 506:

> "While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate."

In *Asgill* v. *United States*, 60 F. 2d 776 (C. A. 4), it appears that a witness for the Government had testified that she did not know the contents of certain letters written in her behalf and had signed certain letters without reading them. The Court, at page 779, said:

> "Discussing the refusal of the court to require the

production of certain letters above referred to for the purpose of cross-examination, counsel for the government earnestly contends that an inspection of these letters discloses that, if produced, they would only serve the purpose of showing that Alice White Allen had repeatedly said that she was the common-law wife of James Allen, which was not disputed. This assumes that the exploratory nature of the cross-examination must have been limited to the consideration of that fact alone. It excludes the idea that lies at the bottom of all cross-examination, to wit, that it is designed, not only to develop the facts of a case, but to test the witness in matters of recollection, of prejudice or bias, and of truthful statement. The witness had denied a knowledge of the contents of the letters written in the very case now under consideration. She was an important witness for the government, and the defendant was entitled to the fullest opportunity to balance fact against fact, to weigh the testimony previously given against the testimony in the instant case, and, if possible, to ferret out every detail of the motive which induced her to change her former testimony and to testify as she did against the defendant."

The language of this Court in the recent case *On Lee* v. *United States*, 96 Law Ed. Adv. Op. 776, is appropriate here, "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions."

We respectfully submit that the cases cited by the Court of Appeals in its opinion (R. 495-496) on this point are not apposite here, and do not support the conclusion reached. The cited cases do not involve, as here, a series of statements or confessions made to the FBI by a participant in

the crime shortly after his arrest which are shown to be contradictory of his testimony. They hold, in substance, the following: Notes of an FBI agent as to his investigation need not be produced. *United States* v. *Walker*, 197 F. 2d 491 (C. A. 2); *United States* v. *Ebeling*, 146 F. 2d 254 (C. A. 2); *Lemon* v. *United States*, 20 F. 2d 490 (C. A. 8). There is no error in denying inspection of the private memoranda of a witness when the notes are not used in court. *Goldman* v. *United States*, 316 U. S. 129; *United States* v. *Rosenfeld*, 57 F. 2d 74 (C. A. 2). There is no error in denying production of work papers of the prosecutor in preparing his case. *D'Aquino* v. *United States*, 192 F. 2d 338 (C. A. 9). It is not error to refuse to compel the Government to produce transcripts of testimony given by witnesses before the Securities Exchange Commission. *Boehm* v. *United States*, 123 F. 2d 791 (C. A. 8). The government need not produce papers on file with the United States Commissioner which are equally available to the defense. *Marin* v. *United States*, 10 F. 2d 271 (C. A. 6). Books not mentioned on direct examination are not subject to production on cross-examination. *Chevillard* v. *United States*, 155 F. 2d 929 (C. A. 9). Although the accused has a right to inspect and use on cross-examination any paper used by a witness on direct examination to refresh his present recollection, this right does not exist if the statements are not used by the witness while testifying. *Little* v. *United States*, 93 F. 2d 401. A court of law may not under Section 724 Rev. Stat. 1901 compel one party to produce, before trial, books and papers for inspection of his adversary. *Carpenter* v. *Winn*, 221 U. S. 533.

In *United States* v. *Rosenfeld*, *supra*, it is interesting to note that the court made this significant statement: "These papers (statements made by Government witnesses preparatory to trial) are material only in so far as they contra-

dict what the witness has said on another occasion or has testified to on the stand."

Many matters material and necessary to establish the truth in this case could have been developed had these statements been made available for inspection and cross-examination. The trial of a case in which liberties are involved is not a sporting event or game, but a search for the truth. Marshall was peculiarly the character of witness requiring the exercise of the most extended freedom of the right of cross-examination. *Greenbaum v. United States,* 80 F. 2d 113 (C. A. 9).

II.

The second point upon which certiorari was granted is set forth as number three (3) of "Questions Presented", at Page two (2) of the Petition for Certiorari and reads as follows:

> "3. Is it an undue restriction of cross-examination and deprivation of a fair trial to prohibit cross-examination of the Government's key witness which would have shown that at the time he entered his plea of guilty to the offense about which he testified against the defendants his own case had been referred to the Probation Department for presentence recommendation; that the witness' lawyer and the prosecutor had discussed disposition of the witness' case in chambers with the Court the previous day; that he was advised by the Court that if he expected a recommendation for lenient sentence or for probation, it would be essential that he satisfy the Probation Department that he had given the law enforcement authorities full information; and that he was admonished by the Court that he would be "well advised" to tell the probation authorities the whole story even though it might involve others."

The two (2) points urged in the Brief and upon which certiorari was granted are closely related.

The Defendants reassert their contention that without the testimony of Marshall there would have been no sufficient issue to submit to the jury.

The Court of Appeals below, in its opinion, said, "Marshall was peculiarly the character of witness requiring the exercise of the most extended freedom of the right of cross-examination" (R. 494).

Under these circumstances, the Defendants sought to show, and to submit to the jury occurrences which would show the witness Marshall's relationship to the prosecution, and which could have been a basis for the jury to draw the conclusion that Marshall's testimony was colored and motivated by a fear of punishment, and a hope for leniency, contrary to his testimony on cross-examination.

However, cross-examination of Marshall on the question of threat or promise was limited by the Court to asking for his conclusion concerning any threats or promises. While it is true that he insisted that he had not been threatened and had no hope or expectations or promises of reward or immunity for his testimony, counsel for the Defendants were forbidden to show on cross-examination or by proof, that events had occurred which would have shown that this testimony by Marshall was untrue (R. 201). (See footnote of the Opinion by the Court of Appeals below (R. 497, 498, 499).)

Although the Defendants were permitted to show by cross-examination that Marshall had plead guilty to possession of stolen property involved in the case at bar, and that he had not been sentenced at the time of the trial in this case, which occurred more than nine (9) months subsequent to his plea, all other cross-examination on the point

was cut off "*in limine*." *Alford* v. *United States*, 282 U. S. 687, 692.

The record at Pages 197-201 describes the manner in which evidence of these events was sought by cross-examination, and shows the trial court's ruling thereon.

Counsel for the Defendants read to the Court from a transcript of the proceedings before Judge Levin of Detroit, on Marshall's arraignment upon a charge of possessing part of the property involved in the case at bar. Marshall had freely admitted that he made "4, 5 or 6" signed statements each of which varied from the others and none of which named the Defendants here as participants in crime, all before the date of his arraignment (R. 206, 207). It was not until August 25th that he first named Gordon or MacLeod as participants in the crime (R. 207); this was one week after his arraignment before Judge Levin on August 18th, in Detroit (R. 198).

Judge Levin's statements to Marshall at that time included the following:

> "Very well, the plea of guilty is accepted. Now, I am going to refer your case to the Probation Department for presentence report. I think I should say to you, as I said to your lawyer yesterday when he and Mr. Smith called upon me in chambers yesterday morning, that it seemed to me that if you intended to plead guilty and expected a recommendation for a lenient sentence or for probation from the Probation Department, that it would be essential that you satisfy the Probation Department that you have given the law enforcement authorities all the information concerning the merchandise involved in this proceeding." and
>
> "As I understand it, there was a tremendous amount of film involved," and
>
> "and it is very important for the law enforcement authorities to apprehend all of those who participated in this rather large theft from the interstate commerce shipment.

"I am not holding out any promises to you, but I think you would be well advised to tell the probation authorities the whole story even though it might involve others" (R. 199).

The trial court definitely and completely denied leave to inquire concerning Judge Levin's statement to Marshall, on cross-examination and forbade reference by counsel for the respective Defendants to these remarks by Judge Levin (R. 200, 201).

Probation, like parole, permits the enlargement of a convicted person subject to conditions which may be prescribed. It is a matter of discretion and may be revoked for conduct which the Court considers violative of the conditions imposed. Its grant is a matter of discretion when the Court is satisfied "that the ends of justice and the best interest of the public as well as the Defendant will be served thereby". Certainly an applicant for probation is a supplicant for liberty at the discretion of the Court (See Section 3651, Title 18). The prospective probationer certainly has no right to probation and, of course, recognizes that he must convince the Judge before whom his fate is perding that he has performed each and every condition imposed by the Judge.

The petitioner for probation is not concerned with legalistic niceties, and in his desire to avoid imprisonment seeks for inferences and implications in the procedure, and like a juror hearing instructions, hangs on every word uttered by the Judge.

In the case at bar, Marshall had not yet realized the full reward for his cooperation with the prosecuting authorities. The jury was denied all knowledge of the Court's remarks to Marshall and upon which he based his hopes of the forthcoming probation. The Defendants submit that Judge Levin's statement to Marshall was so phrased that

it led Marshall to believe that if he complied with the Judge's admonition to "satisfy the Probation Department that you have given the law enforcement authorities all the information concerning the merchandise involved in this proceeding" and "you would be well advised to tell the probation authorities the whole story even though it might involve others", then the witness could claim his long deferred reward, of "lenient sentence or probation".

Certainly the jury should have been informed concerning Judge Levin's statement so that it could judge whether the clearly implied promise and threat had affected Marshall's testimony. The only "law enforcement authority" involved in the matter were the agents of the Federal Bureau of Investigation, and the prosecutors, representing the same sovereign prosecuting the case at bar.

Marshall changed his story after Judge Levin's admonition, and for the first time, one week later, on August 25th, named MacLeod and Gordon, and told a story which apparently "satisfied" the agents for, of course, Marshall was still free nine (9) months later, when he testified in the case at bar.

As was stated in the trial court, the sword of Damocles was held over Marshall's head from the time of his plea until the completion of his testimony, and the condition upon which it would fall or be removed was clearly stated by the Judge before whom he had entered his plea of guilty (R. 199).

The jury which was to pass upon Marshall's credibility was denied complete opportunity to appraise the terms of the contract which Marshall appears to have fulfilled by his testimony.

In *Meeks* v. *United States*, 163 F. 2nd 598 (C. A. 9), a very similar situation occurred. The Defendant there was

denied permission to show that an important witness was a parolee, and to show the conditions of the parole.

The Court of Appeals there said, at Pages 599 and 600, "It is difficult to imagine a more direct and intimate relationship likely to affect one's testimony than that between the Plaintiff Government and its most important witness in establishing this first degree murder. Only by following the stated and other conditions of the parole would the Plaintiff permit the witness to remain out of the penitentiary."

After stating the conditions of the parole the Court further said (p. 600): "Such a witness who testified to such intimate relations with one proposing they join in a murder and who so claimed to have aided the Defendant, well could imagine that favorable testimony would procure a kindly and favorable consideration of the borderline question which might terminate his parole. * * * Unfavorable decision in any of these well could cause the Plaintiff's Marshall to take the Plaintiff's witness to the penitentiary".

The case of *Sandroff* v. *United States*, 158 F. 2d, 623 is directly in point. The Court said at page 629:

> "In our judgment, the district court committed reversible error; in the first instance, in shutting off the cross-examination of Charles Ginns upon the question of promised or expected immunity; and, later, in refusing to permit his cross-examination upon the tendered subject matter pertaining to why he and his son Jack Ginns, who, though named as coconspirators in pari delicto with Sandroff, had not been included as defendants in the indictment. The two Ginns were the chief and indispensable Government witnesses in the prosecution of Sandroff and his company. In such circumstances, it was highly important that latitude be allowed in cross-examination to test their motives for testifying against Sandroff as bearing directly upon their credibility."

"The decision and opinion of this court in *Farkas* v. *United States*, 6 Cir., 2 F. 2nd 644, 647, is directly in point, and clearly indicates that the judgment below must be reversed and the case remanded for retrial."

"Inasmuch as the question involved is the motive for testifying falsely and therefore the state of mind of the prosecuting witness, the relevant evidence is not alone the acts or attitude of the district attorney but anything else that would throw light upon the prosecuting witnesses' state of mind. *It is therefore entirely proper, either by cross-examination of the witness himself, or otherwise, to show a belief or even only a hope on his part that he will secure immunity or a lighter sentence, or any other favorable treatment, in return for his testimony, and that, too, even if it be fully conceded that he had not the slightest basis from any act or word of the district attorney for such a belief or hope.* The fact that despite a plea of guilty long since entered, the witness had not yet been sentenced, is proper evidence tending to show the existence of such hope or belief." (Italics ours.)

The leading case on this point is the decision of the Supreme Court in *Alford* v. *United States*, 282 U. S. 687. This decision cites *Farkas* v. *United States*, 6 Cir., 2 F. 2nd, 644 three times, and the Farkas opinion contains the following language, "As bearing upon their credibility, motive for false accusations, as well as bias, was vitally relevant, and testimony tending to show such motive was entirely competent. Concededly promises of immunity are admissible;"

Other authorities which show that proper cross-examination was denied in the case at bar, are plentiful. Among them is *People* v. *Lacey*, 339 Ill. 480, 485, where the Court states:

"The witness was testifying as an accomplice and attempted to shift the main burden of the crime upon plaintiff in error, and under such circumstances his

cross-examination should not have been unduly limited, and plaintiff in error should have been given every opportunity to ascertain the motive with which the witness was testifying, so that the jury might be able to judge whether he was testifying to vindicate the law and preserve the good order of society or whether he was prompted by the desire to save himself from deserved punishment.

And at page 490:

"In the instant case no witness other than the accomplice, Phillips, gave any testimony directly tending to show plaintiff in error's complicity in the crime. The conviction, therefore, rests upon the testimony of such accomplice. It was therefore most highly important that the jury should be correctly instructed and that no errors be committed in the admission of rejection of evidence. This was especially true in this case, as the record shows that immediately after plaintiff in error's conviction the accomplice was released upon probation."

In Moore on Facts Vol. II page 1154 it is stated:

"It is a rule of practice at common law, and is frequently prescribed by statute, that a defendant should not be convicted of crime upon the testimony of an accomplice unless the latter is confirmed upon material points by evidence to which no suspicion attaches. It is a rule of practice as old as the other one, that the person who thus testifies *will not be punished* unless he tells an entirely different story on the stand from what he has told out of court. When a number of parties have been arrested, *there is always a strong temptation to throw the blame on each other,* and to buy immunity by evidence; and the stronger the suspicions are against one, the greater is the temptation, because he has less chance of escape in any other way." (Italics ours.)

In *Hoyt* v. *People*, 140 Ill. 588, 595, it is said:

> "The principal evidence tending to prove the guilt of plaintiff in error is found in the testimony of his co-defendants—accomplices—who admit that they committed the arson, but say that plaintiff in error hired them to do it."
>
> * * * * * *
>
> "But the authorities agree, and common sense teaches, that such evidence is liable to grave suspicion, and should be acted upon with the utmost caution for otherwise the life or liberty of the best citizen might be taken away on the accusation of the real criminal, made either to shield himself from punishment or to gratify his malice; and thus it is said in 1 Phillips on Evidence, (Cowen, Hill & Edw. notes) page 111; 'Accomplices, upon their own confession, stand contaminated with guilt. They admit a participation in the very crime which they endeavor, by their evidence, to fix upon the prisoner. They are sometimes entitled to even a reward upon obtaining a conviction, and *always expect to earn a pardon.* Accomplices are therefore of a tainted character, giving their testimony under the strongest motives to deceive." And it is said in Best on Evidence, (p. 266, sec. 170) in speaking of approvers and accomplices":
>
> "* * * their single testimony, alone, is seldom of sufficient weight with the jury to convict the offenders, it being so strong a temptation to a man to commit perjury, if, by accusing another, he can escape himself."

It does not require indulgence in imagination to perceive that a witness, who at the time of his testimony is awaiting disposition of his own plea of guilty before a Judge, who admonished him as to his future conduct and its likely effect upon disposition of his case, would be a facile witness for the prosecution. Consequently the proceedings in Detroit bore importantly upon the motive and bias of Marshall. These proceedings should have been

disclosed to the jury, so that it would completely and properly estimate the credibility of Marshall. As this case was tried, the jury heard only Marshall's denials that he was acting from fear or hope of reward.

The error in denial of proper cross-examination was emphasized by the refusal of the trial court to give a suggested instruction regarding the care with which the testimony of a person who anticipates immunity should be weighed (R. 425, 455). No equivalent instruction was given by the trial court.

It is respectfully submitted that the Court of Appeals below erred in its decision confirming the conviction, and approved a practice which is contrary to the decisions of the Supreme Court and other Courts of Appeal on a matter of importance in the conduct of trials.

Conclusion.

The verdict in the case at bar was reached by a jury of men and women in continuous deliberation from eleven a.m. until about three a.m. the following morning (R. 445), and only after the trial court had given a supplemental and admonitory instruction on agreement (R. 447). Marshall's credibility was a principal issue, in a close case.

The errors in denying the Defendants the right to show Marshall's motives and bias, and to show the details of his statements in contradiction of his testimony, warrant a reversal of the judgment.

Respectfully submitted,

GEORGE F. CALLAGHAN,
Counsel for Kenneth C. Gordon.
MAURICE J. WALSH,
Counsel for Kenneth J. MacLeod.

APPENDIX.

STATUTES INVOLVED.

Title 18, United States Code, Section 659, so far as pertinent provides:

> "Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck or other vehicle * * *; or
>
> "Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen;
>
> * * * * * *
>
> "Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Title 18, United States Code, Section 2314, provides:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;
>
> * * * * * *
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Title 18, United States Code, Section 2311, defines value:

> "'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the values thereof."

Title 18, United States Code, Section 3651, provides:

"Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best. * * *"